

NOT FOR PUBLICATION

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

DOMINO OIL, INC.,)	
)	
Plaintiff,)	Case No. 96-99
)	
v.)	
)	
PHOENIX ASSURANCE CO. OF NEW YORK,)	
)	
Defendant.)	
)	

APPEARANCES :

Lee Rohn
St. Croix
For the plaintiff,

Stephen Bruschi
Henry Feuerzeig
St. Thomas
For the defendant.

MEMORANDUM

Moore, C.J.

Pending before the Court is plaintiff's motion for partial reconsideration of this Court's order of August 18, 1998, or in the alternative for "certification"¹ pursuant to Rule 54(b) of the Federal Rules of Civil Procedure of an appeal of this Court's judgment, filed September 1, 1998. The motion will be denied in both respects.

The factual background of this case has previously been discussed and will not be repeated here. This Court previously

¹ "Certification" is not the correct term in this instance. Were the Court to grant plaintiff's request, it would merely declare the partial summary judgment as final and find that there is no "just reason for delay."

dismissed the second amended complaint without prejudice. Based on the motion of Domino Oil, Inc. ["Domino"] for reconsideration, this Court reinstated the second amended complaint against Phoenix Assurance Company of New York ["Phoenix"]. The Court retained the dismissal of the plaintiff's punitive damages claim, however, treating the motion to dismiss as a motion for summary judgment because both parties included much evidence outside the pleadings. The Court found that Domino had

failed to show the required elements of a claim for punitive damages. For plaintiff to recover punitive damages, it must show that the insurer's acts were outrageous and done either with evil intent or reckless indifference. RESTATEMENT (SECOND) OF TORTS, § 908(2) (1967). The plaintiff cannot show such conduct. Therefore, under Virgin Islands law, the claim for punitive damages will be stricken.

Order of August 18, 1998, at 3.

In support of its motion, Domino argues: 1) that it was error for this Court to strike a claim for punitive damages, and 2) that this Court must give notice of its intent to convert a motion to dismiss to one for summary judgment. Domino's primary claim to error is its inability to obtain sufficient discovery on its bad-faith claim due to the entry of a protective order more than a year before Phoenix filed its motion to dismiss. The record shows, however, that Domino had more than ample opportunity to conduct discovery to oppose defendant's motion. Domino had Phoenix's responses to its twenty six interrogatories,

ten of which applied specifically to the allegations of fraud. Additionally, Phoenix deposed Dru McCarthy, Phoenix's 30(b)(6) witness, and Michael Donnelly, the claims adjuster before the protective order was entered. One of the grounds for Domino's Motion for Additional Extension of Time to Respond to the motion to dismiss,² was a request for more time to digest the 30(b)(6) deposition as "it is extremely long, with exhibits comprising approximately seven hundred fifty (750) pages." Further, Domino's filings in this case are fact-intensive, to say the least. Finally, plaintiff chose not to file a Rule 56(f) motion.³

The Court finds no support for Domino's contention that discovery has been "very limited" and "extremely curtailed" (Motion at 10). On the contrary, plaintiff had ample opportunity to properly defend against the motion, or to advise the Court of its inability to do so without more time through Rule 56(f).

Domino's suggestion that the Court was required to give notice that the motion to dismiss would be treated as one for partial summary judgment is totally without merit. First, Domino itself referred numerous times in the pleadings to the motion as

² Filed February 28, 1997, a full year before the entry of the protective order.

³ Federal Rule of Civil Procedure 56(f) provides that if a party opposing a motion cannot present sufficient facts to justify its opposition, the opposing party may file affidavits to that effect. The court may then deny the underlying motion or grant a continuance to allow the opposing party time to develop the factual basis for its opposition.

5 The pleadings on the motion for reconsideration (the re-
reconsideration of which is the subject of the pending motion) alone included
10 exhibits totaling 57 pages. The underlying motion to dismiss contained 10
exhibits, amounting to hundreds of pages and requiring an entire manila folder
for that pleading alone. A separate motion to dismiss the punitive damages
claim contained another 11 exhibits. Domino's opposition was 58 pages, a
large portion of which was factual quotes from Mr. Donnelly's deposition; 12
exhibits totaling over one hundred pages accompanied the opposition, including
large portions of several depositions.

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ORDER

For the reasons stated in the foregoing Memorandum, it is hereby

ORDERED that plaintiff's motion for partial reconsideration is **DENIED**.

ENTERED this 21st day of December, 1998.

For the Court

_____/s/_____
Thomas K. Moore
Chief Judge

ATTEST:
ORINN ARNOLD
Clerk of the Court

By:_____/s/_____
Deputy Clerk

cc: Hon. G.W. Barnard
Mrs. Jackson
Adam Farlow
Lee Rohn
Stephen Bruschi
Henry Feuerzeig
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